



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

JAN 29 2019

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Request for Waiver Pursuant to the Criminal Statute, 18 U.S.C. § 208(b)(1)

FROM: David Cozad *David Cozad*
Deputy General Counsel and
Acting Designated Agency Ethics Official

TO: J. Russell Brauksieck
IPA Detailee to Office of Underground Storage Tanks

RE: Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

This memorandum provides you a waiver, pursuant to 18 U.S.C. §208(b)(1), that allows you to participate in certain particular matters while on detail from the State of New York to the Environmental Protection Agency (EPA), Office of Underground Storage Tanks, under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.*¹ While on detail under the IPA, you remain an employee of the State of New York. As such you are prohibited by the criminal law from participating in any particular matter that could have direct and predictable effect on the interests of your New York state agency, absent a waiver under 18 U.S.C. § 208(b)(1).

The criminal conflict of interest statute, 18 U.S.C. § 208(a), prohibits an executive branch employee from participating personally and substantially in any particular matter in which the employee knows that he or she has a financial interest directly and predictably affected by the matter, or in which the employee knows that a person whose interests are imputed to the employee has a financial interest directly and predictably affected by the matter, unless the employee has received a waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualifies for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For purposes of the criminal conflict of interest statute, the financial interests of the following persons are imputed to the employee: any spouse or minor child of the employee; any general partner of a partnership in which the employee is a limited or general partner; any organization in which the employee serves as officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating or has an arrangement concerning prospective employment. The term "particular

¹ Individuals detailed to EPA under an IPA are considered "employees" for the purposes of the federal conflict of interest statutes codified at Title 18 of the United States Code, including 18 U.S.C. § 208(a), and the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635. 5 U.S.C. § 3374(c); 5 C.F.R. § 2635.102(h) (defining "employee" as including "employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, *et seq.*").

matter” includes only matters that involve deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters that do not involve formal parties and may extend to legislation or policymaking that is narrowly focused on the interests of a discrete and identifiable class of persons.

Under 18 U.S.C. § 208(b)(1), an agency may permit an employee to participate in a matter in which the employee has an otherwise disqualifying financial interest, if it is determined that the disqualifying financial interest is “not so substantial as to be deemed likely to affect the integrity of the employee’s services to the Government.” Based on the totality of the circumstances, I have determined that the financial interests subject to this waiver are not so substantial as to be deemed likely to affect the integrity of your services to the Government. Therefore, I grant you this waiver under 18 U.S.C. §208(b)(1), which authorizes you to participate in certain particular matters, as discussed below.

Background

You currently are employed as Section Chief for the Spill Prevention and Bulk Storage Section of the New York State Department of Environmental Conservation. In this position, you work in the Division of Environmental Remediation, and have over thirty years of experience with underground storage tanks and will bring the local and state government perspective to the national policy arena.

EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the states and federally recognized tribes. Thus, like other states, New York is directly regulated by EPA but also serves as a co-regulator in carrying out our environmental mandate.

At EPA, you will be assigned to the Release Prevention Division in the Office of Underground Storage Tanks where you will serve as the program expert on prevention of leaks from underground storage tanks (UST). You will assist in developing guidance materials for EPA regions and states on implementing the revised UST regulations and develop guidance materials, conduct analyses and participate in activities related to preventing and detecting releases from USTs. You will assist in overseeing UST prevention programs in states and Indian country, including the provisions of the Energy Policy Act of 2005, but you will not work directly with New York. During your detail, you will not retain any responsibilities associated with your position of record in the State.

Otherwise Disqualifying Financial Interest

Because you continue to be an employee of the State of New York, the financial interests of New York are imputed to you for the purposes of 18 U.S.C. § 208(a). Absent a waiver from the imputed interest, you would be prohibited from participating in any particular matter that

affects New York's financial interests.

Application of Applicable Law to Your Request for a Waiver and Decision

You seek a waiver under 18 U.S.C. § 208(b)(1) to permit you to participate in particular matters as an employee of the EPA that may have an effect on the financial interests of the State of New York. As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. *See* 18 U.S.C. § 208(b)(1); 5 C.F.R. § 2640.301. As articulated in the 18 U.S.C. § 208, and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee.

In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You will be on an IPA assignment from New York although EPA will reimburse New York for your state salary and benefits;
- New York is directly regulated by EPA but also serves as a co-regulator in carrying out EPA's environmental mandate;
- Your position on the IPA detail will not involve your personal and substantial participation in particular matters that involve New York as a party, or as a representative of a party; and
- You will not participate personally and substantially in any particular matter that would directly and predictably affect your employment, salary, or other benefits from New York.

I have considered these factors carefully, as well as the fact that you will not participate in particular matters that involve the State as a specific party. Under the statute, then, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA detail is particularly relevant.

By signing the IPA agreement, EPA and the State both assigned you to work on national underground storage tank issues that may affect the State as a matter of general applicability. The "integrity of the services" that the State and EPA expect from you in your current position is to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA, the State recognized that your EPA scope of work may entail working directly on particular matters that involved it but placed no parameters on your ability to represent EPA's interests over theirs. There was no limit on the performance of those duties even

if those duties were not fully aligned with the interests of the State on a particular matter. That said, as part of your EPA duties, you will not work on any specific party matter that involves your state or your state agency. Instead, you will be serving as a technical advisor, not as a decision maker, in developing guidance materials to implement revised UST regulations to prevent and detect releases from USTs. The UST program is a unique program wherein the Federal regulation puts no requirements on state entities that do not have State Program Approval. As you know, New York State does not have state program approval. Thus, while the federal UST regulation applies to facilities in New York, the State itself is not required to take actions to directly implement this Federal UST law. Instead, New York has its own state UST regulation that it implements. Thus, any changes to the Federal UST regulation's guidance document that you will be participating in will not directly impact your home state or impel it to do anything differently.

The guidance materials you work on will undergo a stakeholder review process that will typically involve inviting states, industry customers, or other affected public stakeholders to comment on draft documents. All guidance materials will also undergo review and final approval by a full-time EPA employee, the Release Prevention Division Director. EPA has determined in the Regulatory Impact Analysis (for the revised 2015 UST regulation) that the average compliance costs will be approximately \$715 per typical facility (i.e., gas stations) among motor fuel retailers (not individual states) nationally. The guidance material developed should not affect this figure in any significant way. The materials produced will facilitate compliance by explaining or clarifying requirements.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including states. By agreeing to let you work directly with EPA to develop the UST regulatory structure, your employer understands the implications of your participation. Although your work may have an impact upon New York along with other states, your work will not affect the ability or willingness of your employer to maintain your position of record or to honor its obligations to you with respect to your defined benefit plan. I therefore do not find that your imputed financial interest in the State is likely so substantial as to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Scope of Waiver and Limitations

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you during your IPA detail and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208(a) to participate in your official participation in particular matters of general applicability that affect New York as a member of a discrete and identifiable class, so long as such matters do not have a special or distinct effect on the State other than as part of a class. This waiver is limited, however, and does not permit you to participate in any other particular

matter, including any particular matter involving specific parties in which New York is or represents a party or otherwise has a financial interest. Moreover, you may not participate in any particular matter that would have a direct and predictable effect on your employment, salary, or other benefits from New York.² This waiver will cease to be effective when your IPA detail ends.

Conclusion

Based on the factual circumstances of this request, including the expectations of the State and EPA that you are performing work to benefit both organizations, and the limited nature of the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

You must keep in mind that this waiver does not apply to any particular matter other than those discussed above. While on the IPA assignment you will continue to be subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Director of the Ethics Law Office, or me.

As required, my staff consulted with the Office of Government Ethics, prior to the issuance of this waiver. *See* 5 C.F.R. § 2640.303. Your appointing official in the Office of Underground Storage Tanks agrees to this waiver. Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

cc: Carolyn Hoskinson, Director, Office of Underground Storage Tanks
Justina Fugh, Director, Ethics Law Office

² I note that you participate in the New York State and Local Retirement System, which is a defined benefit plan that provides full pension benefits at age 62. Pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflict of interest statute. *See* 5 C.F.R. § 2640.201(c)(1)(ii), 2640.201(c)(1)(iii) and 2640.201(c)(2).